



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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Senator John McCain

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MUR 5799

STATEMENT OF REASONS OF COMMISSIONER HANS A. von SPAKOVSKY

(Participation of Federal candidate in State candidate fundraising events)

This matter presents issues similar to those previously considered in MUR 5712 (McCain), specifically, the participation of Federal candidates in State candidate fundraising events and the pre-event publicity associated with those events. I dissented in MUR 5712 and issued a Statement of Reasons to explain my view that no improper solicitation occurred.

I dissented in this matter as well because Senator John McCain did not solicit any impermissible, non-Federal funds for Stan Spears, a candidate for re-election to the position of South Carolina's Adjutant General. The invitation in this matter contained specific solicitations (\$1,000, \$500, \$250, and \$100), all within the Federal limits, that did not require any *Cantor* disclaimer, and one general solicitation (the "other" amount option) that was appropriately limited by the prescribed *Cantor* disclaimer. Thus, there was no violation of the law.

I. Background

Senator McCain agreed to participate as the special guest at a fundraising event for Stan Spears, a candidate for South Carolina Adjutant General. The Spears' campaign sent invitations to potential attendees. The first page of the invitation identified Senator McCain as the "special guest" at "a private reception honoring Adjutant General Stan Spears." The second page of the invitation consisted of the reply card. If the recipient wished to attend, he was to check the "Yes" option and indicate the amount of his contribution on a blank line. In parentheses was "\$100 minimum per couple." If the recipient chose not to attend, he could check the "No" option, but still send in a donation as a show of support for Mr. Spears. The following check-off options appeared: \$1,000, \$500, \$250, \$100, and "other," followed by a blank line on which the donor was to write the amount of the donation.

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At the bottom of the reply card was the following disclaimer, in smaller type than the rest of the card's text:

Contributions to Spears for Adjutant General are not tax deductible for federal income tax purposes. The solicitation of funds is being made only by Spears for Adjutant General. We are honored to have Senator McCain as our Special Guest for this event. In accordance with federal law, Senator McCain is not soliciting individual contributions in excess of \$2,100 per person, nor is he soliciting corporate, labor union, or foreign national contributions. South Carolina state law allows campaign contributions of up to \$3,500 per election cycle. Registered lobbyists please disregard.

My colleagues found that this reply card rendered Senator McCain in violation of Federal campaign finance law for two interrelated reasons. First, "although the solicitation sought specific amounts only up to \$1,000, it also included an 'other' space, constituting a failure to limit the solicitation to federally-permissible amounts." *Factual and Legal Analysis in MUR 5799* at 7. Second, they concluded that the inclusion of the fourth sentence in the disclaimer ("South Carolina state law allows campaign contributions of up to \$3,500 per election cycle.") "impl[ied] that contributors could exceed the Federal contribution limit," and effectively negated the preceding sentence, on the grounds that "[a] Federal officeholder may not inoculate a solicitation of non-Federal funds by 'reciting a rote limitation, but then encouraging the potential donor to disregard the limitation.' See AO 2003-03." *Factual and Legal Analysis in MUR 5799* at 7-8. Thus, to the extent that the "other" option was a general solicitation that required a *Cantor* disclaimer, the *Cantor* disclaimer was rendered ineffective and Senator McCain was adjudged to have "violated BCRA's prohibitions on soliciting non-Federal funds." *Factual and Legal Analysis in MUR 5799* at 8. I disagree strongly with this conclusion and the analysis that fostered it.

II. Analysis

What is particularly bothersome about the result in this matter is that it stems from completely commonplace language that might be found in any political fundraising piece, and serves the purpose of imparting important legal information to potential donors. For most laymen, this disclaimer is nothing more than legal boilerplate. The paragraph is the Spears campaign's effort to cover its legal bases.¹ For those who bothered to read it, it may have imparted useful information. The fifth sentence – which is the object of my

¹ The first sentence is required by Internal Revenue Service regulations. See Internal Revenue Service Notice 88-120, 1988-2 C.B. 454 (Nov. 25, 1988) available at <http://www.irs.gov/charities/article/0,,id=96112,00.html>. Sentences (2) through (4) were included to comply with the Commission's own requirements, as set forth in *Advisory Opinion 2003-03* (Cantor). The Spears campaign was not legally required to include the fifth sentence, but it is an objectively true, legally accurate restatement of South Carolina law. See S.C. Code Ann. § 8-13-1314(A)(1). Finally, the sixth sentence was obviously included to facilitate compliance with South Carolina law by reducing the likelihood that the committee would receive an illegal contribution. See S.C. Code Ann. § 8-13-1314(A)(3) (prohibiting certain contributions from registered lobbyists).

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colleagues' ire – may conceivably have prevented someone from making an illegal contribution. However, my colleagues choose to link this statement of fact to the preceding sentence in a way that destroys the efficacy – and veracity – of Senator McCain's disclaimer. Then, in light of the "other" donation option, they conclude that the invitation as a whole constitutes an impermissibly unlimited solicitation of non-Federal funds.

Sentences (4) and (5) in the disclaimer are not mutually inconsistent. They are there for an obvious reason – because Senator McCain and Mr. Spears sought to simultaneously conduct themselves lawfully. Senator McCain's attorneys presumably advised that Federal law and the Commission required Sentence (4), and Mr. Spears' campaign and legal advisors presumably included Sentence (5) because they did not want to receive any excessive contributions under applicable State law that would have to be returned.² However, my colleagues construe this attempt to *obey the law* into an invitation by Senator McCain to do just the opposite, *i.e.*, to disregard the preceding statement that express limits his solicitation. I decline to attribute such motives to Senator McCain.

Commission regulations state that "[a] solicitation does not include . . . mere guidance as to the applicability of a particular law or regulation." 11 CFR 300.2(m) (2006). Thus, even if Sentence (5) is imputed to Senator McCain as *Advisory Opinion 2003-03* says it must be, I find it incomprehensible that the Commission would treat it as forming part of a solicitation simply because it follows on the heels of the required *Cantor* disclaimer.³

The conclusion that Senator McCain made an illegal solicitation in connection with this matter is a disservice to the public. The message that the Commission clearly sends here is that if the disclaimer sentence stating the limits of South Carolina law were removed, the invitation would pass legal muster. In other words, the price of legal compliance has become invitations that contain *less* information about the recipient's legal rights and duties. This is truly an unfortunate result and it places candidates in a veritable *Catch-22* situation: if they fail to specify the Federal limitations on contributions, they may be found in violation of Federal law; if they fail to specify the State limitations, they may be found in violation of State law; and yet the Commission tells candidates that if they specify the State limitation at the *same time* they warn the public of the Federal limitation, that too constitutes a violation of the law. Only Joseph Heller himself could have designed a more confusing and conflicting rule.⁴ In fact, the results of this enforcement action will no doubt make Senator McCain feel that he has

² Reciting the State law limitation would also protect the campaign from any allegations that it had solicited funds beyond the state contribution limit.

³ Whether the invitation would be acceptable to my colleagues if the fifth sentence had not *directly* followed the *Cantor* disclaimer is not clear. The prospect of the Commission regulating the ordering of boilerplate language is not encouraging though.

⁴ Joseph Heller, *Catch-22*, Simon & Schuster (1961).

much in common with Captain John Yossarian, the U.S Air Force B-25 bombardier who finds himself up against nonsensical, regulatory doublespeak in *Catch-22*.

This matter should have been dismissed with a finding that no violation of the law occurred.

April 16, 2007


Hans A. von Spakovsky
Commissioner

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